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In the Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH A. ANIOL, JR.  
CLERK

THE UNIVERSITY OF TENNESSEE, et al., Petitioners,

v.

ROBERT B. ELLIOTT, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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### **QUESTIONS PRESENTED**

1. Whether traditional principles of full faith and credit apply in federal civil rights actions under the Reconstruction statutes to issues fully and fairly litigated before a state agency acting in a judicial capacity.

2. Whether traditional principles of full faith and credit apply in Title VII actions to issues fully and fairly litigated solely at the insistence of the aggrieved employee before a state agency acting in a judicial capacity outside the Title VII enforcement scheme.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
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**BRIEF FOR PETITIONERS**

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the Sixth Circuit is reported in 766 F.2d 982 (6th Cir. 1985). A copy of the slip opinion and the judgment of the Court of Appeals appear in the Appendix to the Petition for Certiorari. (P.A. 1-25; 183-184)<sup>1</sup> The memorandum decision of the United States District Court for the Western District of Tennessee was not reported but appears in the Appendix to the Petition for Certiorari. (P.A. 26-32) The judgment of the District Court appears in the Joint Appendix. (J.A. 32) The final agency order in the contested case hearing under the Tennessee Uniform Administrative Procedures Act appears in the Appendix to the Petition for Certiorari. (P.A. 33-35)

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1. References to the Joint Appendix are cited as "J.A." References to items reproduced in the Appendix to the Petition for Certiorari are cited as "P.A."

## JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on July 9, 1985. The petition for a writ of certiorari was filed on October 3, 1985, and granted on December 2, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The text of the following constitutional provision and statutes relevant to the determination of this case are set forth in appendices to this brief: U.S. Const. art. IV, § 1; 28 U.S.C. § 1738 (1982); 42 U.S.C. § 2000e-5(b), (c), (d) (1982); Tenn. Code Ann. § 4-5-102(3) (1985); Tenn. Code Ann. §§ 4-5-301 through -323 (1985).

## STATEMENT OF THE CASE

This is an action under the Reconstruction civil rights statutes, 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988 (1982), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982), in which respondent, Robert B. Elliott, alleges that petitioners<sup>2</sup> have engaged in racial discrimination against him. Petitioners seek application of issue preclusion in this action on the ground that a

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2. Petitioners are all defendants below—The University of Tennessee, The University of Tennessee Institute of Agriculture, The University of Tennessee Agricultural Extension Service, University officials (M. Lloyd Downen, Willis W. Armistead, Edward J. Boling, Haywood W. Luck, and Curtis Shearon), members of the Madison County Agricultural Extension Service Committee (Billy Donnell, Arthur Johnson, Jr., Mrs. Neil Smith, Jimmy Hopper, and Mrs. Robert Cathey), Murray Truck Lines, Inc., Tom Korwin, and Tommy Coley.

prior state adjudication, voluntarily invoked by respondent under the Tennessee Uniform Administrative Procedures Act for the purpose of defending his liberty and property interests under the Due Process Clause of the Fourteenth Amendment, is entitled to full faith and credit in federal court.

### A. Respondent's Proposed Termination.

Respondent is employed as an Associate Extension Agent with The University of Tennessee Agricultural Extension Service. During 1981 respondent's superiors observed what in their judgment were instances of inadequate work performance and improper job behavior. Respondent's immediate supervisor and the Dean of the Agricultural Extension Service instituted the University's multi-step disciplinary process in an effort to improve respondent's performance and behavior. These efforts were unsuccessful, however, and instances of inadequate performance and improper behavior continued. (J.A. 21) In December 1981, the University proposed to terminate respondent's employment.<sup>3</sup> (J.A. 21-23)

In a letter dated December 18, 1981, the University notified respondent of the disciplinary charges and his right to a due process hearing prior to the proposed termination. (J.A. 21-23) On December 22, 1981, in a written response made by his attorney, respondent demanded a

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3. The disciplinary charges included allegations of failure to carry out specific work assignments in a timely and proper manner; insubordination; engaging during University working hours in a personal custom cabinet business; playing golf without permission during working hours; making anonymous harassing phone calls to a private citizen in violation of University work rules; public verbal abuse of private citizens; unexcused absences; and unauthorized use of official University telephone for personal long distance calls. (P.A. 39-43)

formal, trial-type hearing under the contested case provisions of the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301 through -323 (1985), to contest the disciplinary charges. Respondent also stated that he intended to prove in the contested case hearing that the University was guilty of racial harassment of him. (Dist. Ct. Nr. 8, Exhibit M to Affidavit of M. Lloyd Downen, filed Feb. 18, 1982)

#### **B. Respondent's District Court Complaint.**

On January 5, 1982, before the due process hearing was convened,<sup>4</sup> and before the EEOC had taken any action on the discrimination charge he had filed in late December 1981, respondent filed this federal court action under the Reconstruction civil rights statutes and Title VII. (J.A. 2-18) Respondent's complaint sought to enjoin the University from taking any employment action against him, one million dollars in damages, and certification of a class action.<sup>5</sup> (J.A. 17-18)

Respondent's complaint included allegations of racial discrimination against him based on the same incidents out of which the University's disciplinary charges arose. Respondent alleged that these incidents, and the disciplinary charges themselves, were acts of racial discrimination and harassment against him by the University, University officials, and the other petitioners.

On January 19, 1982, the district court entered ex parte a temporary restraining order prohibiting the University from taking any disciplinary action against respondent. (Dist. Ct. Nr. 4) The University responded with a motion

4. The hearing was not convened because of the holiday season.

5. The district court did not certify a class action.

to dissolve the temporary restraining order, to dismiss the complaint, and for summary judgment, asserting that respondent did not meet the prerequisites for preliminary injunctive relief nor the jurisdictional prerequisites for a Title VII action. (J.A. 19-20) The district court, without ruling on the University's motion to dismiss and for summary judgment, dissolved the temporary restraining order, ruling that respondent was not entitled to preliminary injunctive relief. (Dist. Ct. Nr. 12, Feb. 23, 1982)

#### **C. Respondent's Departure From The Available Federal Forums To Invoke The State Due Process Hearing.**

Upon dissolution of the temporary restraining order, respondent completely abandoned his Title VII and Reconstruction civil rights claims. Respondent did not seek a Title VII right-to-sue letter at that time or otherwise press his claim within the Title VII enforcement scheme. Nor did he in any way prosecute in federal court his claims under the Reconstruction civil rights statutes. Respondent instead departed entirely from the available federal forums to contest the disciplinary charges in a due process hearing under the Tennessee Uniform Administrative Procedures Act.

The due process hearing convened on April 26, 1982,<sup>6</sup> well past the time when respondent could have requested a Title VII right-to-sue letter. With various recesses, the hearing continued intermittently until October 1982 for a total of twenty-eight days of testimony and argument. (P.A. 36-37)

6. The hearing was a public hearing held in Jackson, Tennessee (over 300 miles from the University headquarters in Knoxville) for the convenience of respondent and his multitude of witnesses.

In compliance with Tenn. Code Ann. §§ 4-5-301 through -323 (1985), the hearing was conducted with procedural rights which in all respects were identical to those available to civil trial litigants under the Tennessee and Federal Rules of Civil Procedure. These trial-like procedural rights included discovery in accordance with the Tennessee Rules of Civil Procedure; compulsory process to discover and produce documents and witnesses for trial; examination and cross-examination of witnesses; application of rules of evidence; and filing of pleadings, motions, objections, briefs, proposed findings of fact and conclusions of law, and proposed orders. In addition, under the provisions of Tenn. Code Ann. § 4-5-302 (1985), respondent could have petitioned for disqualification of the Administrative Law Judge for "bias, prejudice, interest . . . or for any cause for which a judge may be disqualified."

Respondent did not petition for disqualification of the Administrative Law Judge. Nor did he ever challenge the procedural adequacy or fairness of the state proceedings. To the contrary, he fully availed himself of the trial-like procedural rights provided by the Administrative Procedures Act, as is demonstrated by the voluminous hearing record. The transcript alone consists of 55 volumes, including 159 exhibits<sup>7</sup> and 5,000 pages of testimony (P.A. 27) from 104 witnesses, 93 of whom were produced by respondent. Over 100 witness and document subpoenas were issued at respondent's request. Respondent's counsel filed briefs, supplemental briefs, and lengthy proposed findings of fact and conclusions of law.

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7. The vast majority of exhibits were entered by respondent. Some contained over 100 parts, including photographic prints, slides, and even videotapes displayed in the open hearing.

#### **D. Litigation Of The Issue Of Racial Discrimination As An Affirmative Defense To The Disciplinary Charges.**

As the charging party in the due process hearing, the University carried the same burden of persuasion as a plaintiff in a civil trial. The University was required to prove the disciplinary charges by a preponderance of the evidence. Respondent had the right under Tenn. Code Ann. § 4-5-322(h)(1) (1985) to defend the charges on the basis that the agency was acting "[i]n violation of constitutional or statutory provisions." Availing himself of this right, respondent defended on the ground that the charges were racially motivated.

On the first day of the due process hearing, respondent sought to file countercharges of racial discrimination to be tried in the due process hearing. The Administrative Law Judge refused to allow the filing of countercharges, ruling that he was not empowered to dispose of respondent's Reconstruction civil rights or Title VII claims. The Administrative Law Judge further ruled, however, that he was empowered to determine the issue of discrimination as an affirmative defense to the disciplinary charges. (P.A. 44-45, 171)

Respondent fully pursued this affirmative defense and introduced voluminous evidence as to the allegations of individual racial discrimination included in his federal court complaint. Through direct or cross-examination of all 104 witnesses, respondent's counsel sought to establish the discriminatory intent of all parties named as defendants in the federal court complaint with respect to the allegations of individual discrimination alleged in the complaint.

### E. Findings Of The Administrative Law Judge.

In a lengthy order including extensive findings of fact and conclusions of law, the Administrative Law Judge found that the University had sustained its burden of persuasion on four charges of improper job behavior.<sup>8</sup> With respect to the other disciplinary charges, the Administrative Law Judge found that the University either failed to sustain its burden of persuasion or had not provided proper supervision of respondent's work performance. (P.A. 166-170)

The Administrative Law Judge made extensive findings on respondent's affirmative defense that the disciplinary charges were racially motivated. Addressing first the appropriate burden of persuasion with respect to the affirmative defense, the Administrative Law Judge ruled that

[s]ince this is not a civil rights case under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Sec. 2000e, et seq., nor under 42 U.S.C. Sec. 1983, in order to successfully defend [sic] charges of race discrimination, employee must prove by a preponderance of the evidence that the disciplinary actions taken

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8. Specifically, the Administrative Law Judge found (1) that respondent was guilty of playing golf without permission during working hours and in violation of University policy; (2) that respondent falsely made written, public accusations that a private livestock judge refused to make judging decisions in favor of black 4-H youths, the contrary facts being publicly available to respondent; and that respondent's public, profane epithets in front of the livestock judge and false accusation "were unjustified and not protected freedom of speech under the constitution, and evidenced traits undesirable in an AES employee"; (3) that respondent's conduct in front of the private livestock judge constituted disorderly conduct and abusive language in violation of University rules; and (4) that respondent made numerous personal long distance calls from a University business phone in violation of University rules. (P.A. 177-178)

against him were because of his race, and that his supervisors only used the charges of improper job behavior and inadequate job performance as a pretext to propose his termination because he is black. Thus, in his defense, Elliott had the same burden of proving pretext as contained in *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089 (1981).

(P.A. 171)

After a thorough review of the evidence, the Administrative Law Judge made the following ultimate finding on respondent's affirmative defense to the disciplinary charges:

An overall and thorough review of the entire evidence of record leads me to believe that employer's action in bringing the charges against employee, resulting in these proceedings were based on what it, through its administrative officers and supervisors perceived as improper and/or inadequate behavior and inadequate job performance rather than racial discrimination. I therefore conclude that employee has failed in his burden of proof to the claim of racial discrimination as a defense to the charges against him.

(P.A. 177)

Despite finding that the University's proposal to terminate respondent was for valid disciplinary reasons and was not racially motivated, the Administrative Law Judge ordered that respondent be given another chance to improve his job behavior. The Administrative Law Judge ordered, therefore, that respondent not be terminated but instead

transferred to the same position in another county under new supervisors. (P.A. 180-181)

#### **F. Appeal Of The Findings To The Agency Head.**

Pursuant to Tenn. Code Ann. § 4-5-317 (1985), both respondent and the University petitioned the Administrative Law Judge to reconsider his initial order. The University challenged the decision not to terminate respondent. Respondent, on the other hand, challenged the decision to transfer him and urged once again that the disciplinary charges were racially motivated. The Administrative Law Judge denied both petitions, and respondent then appealed to the Agency Head under the provisions of Tenn. Code Ann. § 4-5-315 (1985). The Agency Head affirmed the findings of the Administrative Law Judge and made the following independent finding on the issue of racial discrimination:

I am also convinced from my review of the record that the action of the Extension Service in proposing the termination of employee's services was not motivated by employee's race but by a desire to terminate employee for what the Extension Service sincerely believed to be inadequate job performance and inadequate job behaviour.

(P.A. 34) The Agency Head also affirmed the Administrative Law Judge's conclusion that respondent be transferred to another county on the ground that the proof "was not sufficient under the circumstances to warrant dismissal." (P.A. 34) Respondent's employment was never interrupted during the state proceedings and continues today.

#### **G. Respondent's Return To Federal Court After The Final Agency Judgment.**

Tenn. Code Ann. § 4-5-322 (1985) provides that the only available method of judicial review of a final agency order is by the filing of a petition for review in state chancery court within sixty days of the order. Respondent did not file a timely petition for judicial review. Instead, two months after his transfer had taken place, and eighty-four days after the final agency judgment had been entered, respondent returned to federal district court in late October 1983. (P.A. 29) Eighteen months had passed from the time respondent had departed from the available federal forums to press the issue of racial discrimination in the due process hearing.

Upon returning to the district court, respondent did not seek de novo review of the issue of racial discrimination. Instead, consistent with his earlier departure from the federal forums, respondent filed a motion simply seeking review of the merits of the final agency judgment on the basis of the voluminous record of the state proceedings. (J.A. 24-30) Respondent never filed a Title VII right-to-sue letter in the district court or otherwise requested a de novo review of his Title VII or Reconstruction civil rights claims in the district court.

#### **H. The Decisions Below.**

On May 12, 1984, the district court granted summary judgment in favor of all defendants, holding that it lacked jurisdiction to review the merits of the final agency order and that res judicata precluded relitigation of the issue of racial discrimination fully and fairly adjudicated in the due process hearing. (P.A. 26-32)

Respondent appealed to the Court of Appeals for the Sixth Circuit and for the first time contended that he was entitled to de novo review of the issue of racial discrimination under Title VII and the Reconstruction statutes. The Sixth Circuit reversed the district court and held that, in the absence of state court review, no issue adjudicated by a state administrative agency is ever entitled to preclusive effect in a subsequent employment discrimination action under Title VII or the Reconstruction statutes. (P.A. 1-25)

### SUMMARY OF ARGUMENT

Although no provision of the Reconstruction civil rights statutes, Title VII, or any other federal law required him to do so, respondent purposefully departed from the available federal forums and fully litigated the issue of racial discrimination in a state agency adjudication conducted for the purpose of protecting his Fourteenth Amendment liberty and property interests. The final agency judgment is entitled to preclusive effect in Tennessee state courts and thus is also entitled, under the full faith and credit clause, U.S. Const. art. IV, § 1, and statute, 28 U.S.C. § 1738 (1982), to preclusive effect in respondent's subsequent federal court action under the Reconstruction statutes and Title VII.

This Court's decisions in *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra v. Warren City School District*, 465 U.S. 75 (1984), demonstrate a firm commitment to traditional principles of full faith and credit in civil rights actions and unequivocally establish that the Reconstruction statutes do not repeal the mandate of full faith and credit. Emphatically rejecting the notion that state adjudication of a federal right cannot be trusted, the

*Allen* and *Migra* decisions clearly articulate the full faith and credit analysis required of federal courts: Whether the prior state adjudication is entitled to preclusive effect in the courts of the state in which it was rendered and, if so, whether the party against whom preclusion is asserted had a full and fair opportunity to litigate in the state forum. The Sixth Circuit failed to apply the full faith and credit analysis prescribed by *Allen* and *Migra* and denied issue preclusion in this case even though the prior adjudication unquestionably is entitled to preclusive effect in Tennessee courts and even though the federal district court itself found that respondent had received full procedural due process in the state proceeding.

Decisions of this Court not only establish that there is no exception to traditional principles of full faith and credit for Reconstruction civil rights actions, but also that there is no exception to the full faith and credit due an adjudication of issues by a state agency acting in a judicial capacity. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Chicago R.I. & P. Ry. v. Schendel*, 270 U.S. 611 (1926); see also *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 n.26 (1982); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) (traditional rules of issue preclusion apply to decisions by agencies acting in a judicial capacity). Indeed, the very purpose of full faith and credit—to place national sanction behind state laws of preclusion—can be accomplished only if the effect of a state judgment, whether rendered by a court or by an agency acting in a judicial capacity, is determined according to the rules of preclusion of the state in which it was rendered.

Distrust of a state agency adjudication is completely unwarranted when the adjudication is provided by state law for the express purpose of protecting an individual's constitutional and statutory rights against arbitrary state action. When the state proceeding, voluntarily invoked, provides all the procedural safeguards of a federal court proceeding, the policy considerations supporting rules of preclusion as well as concerns of comity and federalism demand that federal courts apply full faith and credit to the final agency judgment.

This Court's commitment to traditional principles of full faith and credit extends to Title VII actions as well as actions under the Reconstruction statutes. In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court squarely held that Title VII does not expressly repeal the mandate of full faith and credit. This Court also held in *Kremer* that Title VII does not impliedly repeal the full faith and credit due a state court judgment in a subsequent Title VII action.

Full faith and credit is equally mandated with respect to the Title VII action in this case. No provision of Title VII can be construed as an express or implied repeal of the full faith and credit due the final agency judgment in this case. Nothing in Title VII required respondent to invoke the state proceedings or to litigate the issue of racial discrimination there. The only state proceedings which must be invoked under Title VII are those established by state law to remedy employment discrimination. Respondent, however, invoked a state statutory proceeding provided for the protection of his liberty and property interests under the Fourteenth Amendment. No provision of Title VII repeals the full faith and credit owing a state

agency adjudication voluntarily invoked by a state employee outside the Title VII enforcement scheme.

There is no question that the issue of racial discrimination was properly before and wholly within the competence of the state tribunal voluntarily invoked by respondent. Under state law, respondent was entitled to show that the University's proposed termination of his employment would be "[i]n violation of constitutional or statutory provisions." Tenn. Code Ann. § 4-5-322(h)(1) (1985). Respondent in fact defended on the ground that the University's actions were racially motivated, and pursuant to the requirements of state law, voluminous evidence of alleged racial discrimination was admitted in support of respondent's affirmative defense to the disciplinary charges. The fact that the state tribunal was not empowered to determine respondent's Title VII claim in no way detracts from the full faith and credit due the findings made within the conceded competence of the tribunal to adjudicate respondent's affirmative defense. As this Court recently reaffirmed in *Marrese v. American Academy of Orthopaedic Surgeons*, ..... U.S. ...., 105 S. Ct. 1327 (1985), absent an exception to the statutory command of full faith and credit, state law determines the issue preclusion effect of a state judgment even with respect to claims within the exclusive jurisdiction of the federal courts.

There can be no doubt in this case that respondent had every opportunity to and did litigate the issue of racial discrimination fully and fairly in the state proceedings. The state proceedings were conducted in virtually the same manner as a trial in state or federal court. Respondent was represented by counsel at every stage of the proceedings and exercised the full array of procedural

rights available to him under state law. Indeed, respondent has never challenged in any state or federal proceeding below the adequacy or fairness of the procedures under which his due process hearing was conducted. Denial of full faith and credit to the state proceedings in this case would not only undermine the integrity of those proceedings but also needlessly burden the federal court with duplicative litigation. Respondent is fairly bound by his chosen forum's state law that one full and fair opportunity to litigate an issue is enough.

### ARGUMENT

#### I. TRADITIONAL PRINCIPLES OF FULL FAITH AND CREDIT APPLY IN FEDERAL CIVIL RIGHTS ACTIONS UNDER THE RECONSTRUCTION STATUTES TO ISSUES FULLY AND FAIRLY LITIGATED BEFORE A STATE AGENCY ACTING IN A JUDICIAL CAPACITY.

##### A. This Court Has Consistently Held That Civil Rights Actions Under The Reconstruction Statutes Are Not Categorically Exempt From Traditional Principles Of Full Faith And Credit.

In *Allen v. McCurry*, 449 U.S. 90 (1980), this Court endorsed the virtually unanimous view of the courts of appeals that traditional principles of full faith and credit are applicable in civil rights actions under the Reconstruction statutes. If any case presented an especially appealing situation for creating an exception to full faith and credit, it was *Allen*. McCurry, the federal plaintiff in an action under 42 U.S.C. § 1983 (1982), did not select the state

forum; he was, rather, a defendant in a state criminal proceeding. The state's interest in obtaining a conviction was acute—McCurry was not only dealing in heroin, he shot and seriously wounded two undercover police officers who had gone to McCurry's home to attempt a purchase. Moreover, as a result of this Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976), McCurry's § 1983 action was his only avenue of access to a federal trial forum for litigation of his federal constitutional claim.

Nonetheless, in *Allen*, this Court squarely held that nothing in the language or legislative history of § 1983 suggests any congressional intent to contravene traditional principles of issue preclusion or to repeal the express statutory requirements of the full faith and credit statute, 28 U.S.C. § 1738 (1982). In so holding, this Court categorically rejected the notion that every person is entitled to one unencumbered opportunity to litigate a federal right in a federal district court:

[N]othing in the language or legislative history of § 1983 proves any congressional intent to deny binding effect to a state-court judgment or decision when the state court, acting within its proper jurisdiction, has given the parties a full and fair opportunity to litigate federal claims, and thereby has shown itself willing and able to protect federal rights. . . . There is, in short, no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.

The only other conceivable basis for finding a universal right to litigate a federal claim in a federal district court is hardly a legal basis at all, but rather a general distrust of the capacity of the state courts to render correct decisions on constitutional issues. It is ironic that *Stone v. Powell* provided the occasion for the expression of such an attitude in the present litigation, in view of this Court's emphatic reaffirmation in that case of the constitutional obligation of the state courts to uphold federal law, and its expression of confidence in their ability to do so.

449 U.S. at 103-05.

The commitment to traditional principles of full faith and credit in civil rights actions which this Court first expressed in *Allen* was reaffirmed in *Migra v. Warren City School District*, 465 U.S. 75 (1984). In *Migra*, this Court unanimously agreed that a state court judgment is entitled at least to as much claim preclusion effect in a subsequent federal civil rights action under § 1983 as it would have in the courts of the state in which it was rendered. Justice Blackmun, who dissented in *Allen*, delivered the opinion of the Court. He readily acknowledged that the heart of the opinion in *Allen*—namely, that state courts are as obligated and able to uphold federal rights as federal courts—applies with just as much force to claim preclusion as issue preclusion:

It is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments. The argument that state-court judgments should have less preclusive effect in § 1983 suits than in other federal suits is based on Congress' expressed concern over the adequacy of

state courts as protectors of federal rights. . . . *Allen* recognized that the enactment of § 1983 was motivated partially out of such concern, . . . but *Allen* nevertheless held that § 1983 did not open the way to relitigation of an issue that had been determined in a state criminal proceeding. Any distrust of state courts that would justify a limitation on the preclusive effect of state judgments in § 1983 suits would presumably apply equally to issues that actually were decided in a state court as well as to those that could have been. If § 1983 created an exception to the general preclusive effect accorded to state-court judgments, such an exception would seem to require similar treatment of both issue preclusion and claim preclusion. Having rejected in *Allen* the view that state-court judgments have no issue preclusive effect in § 1983 suits, we must reject the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case.

465 U.S. at 83-84.

Thus, *Allen* and *Migra* clearly delineate the relevant analysis with regard to the preclusive effect of a state adjudication in a subsequent federal civil rights action under the Reconstruction statutes. The relevant analysis is unmistakably one of full faith and credit. As this Court emphasized in *Allen*, a departure from traditional principles of full faith and credit can be justified only if plainly intended by Congress. In *Allen* and *Migra*, however, this Court found nothing in the language or legislative history of § 1983 to suggest any congressional intent to contravene traditional principles of preclusion or to repeal the express statutory requirements of the full faith and credit statute.

A prior state adjudication is entitled to preclusive effect in a subsequent federal civil rights action, therefore, as long as the adjudication would preclude relitigation of the claim or issue in the courts of the state in which it was rendered. To this extent, the preclusive effect of a prior state adjudication is defined as a matter of state law. Federal law acts as a restraint only to the extent of ensuring that the state proceedings afford the party against whom preclusion is asserted a full and fair opportunity to litigate. See *Allen*, 449 U.S. 90, 95 (1980).

Although ignored by the Sixth Circuit, the full faith and credit analysis prescribed by this Court in *Allen* and *Migra* requires that respondent be precluded from relitigating the issue of racial discrimination in his federal court action under the Reconstruction civil rights statutes. First, Tennessee law provides that an adjudication by a state agency acting in a judicial capacity is entitled to preclusive effect in Tennessee courts. See *Polsky v. Atkins*, 197 Tenn. 201, 270 S.W.2d 497 (1954); *Fourakre v. Perry*, 667 S.W.2d 483 (Tenn. App. 1983); *Purcell Enterprises, Inc. v. State*, 631 S.W.2d 401 (Tenn. App. 1981). Second, there can be no doubt that respondent was afforded a full and fair opportunity to litigate the issue of racial discrimination. Respondent's due process hearing was conducted with complete trial rights including discovery, witness and document subpoenas, representation by counsel, examination and cross-examination of witnesses, and filing of pleadings, motions, objections, briefs, proposed findings of fact and conclusions of law, and proposed orders. The transcript portion of the hearing record alone is voluminous—55 volumes with over 5,000 pages of testimony from 104 witnesses, not to mention 159 exhibits. Respondent called ninety-three witnesses. The issue of discrimination hardly could have been litigated more fully in either state

or federal court. In fact, the district court made the following specific finding concerning respondent's full and fair opportunity to litigate in the due process hearing:

Plaintiff makes no claim of denial of procedural due process. Nor can he in light of the long exhaustive evidentiary hearing in which plaintiff presented more than ninety witnesses, and cross-examined some of the agency's witnesses for more than thirty hours each. Plaintiff clearly has received full protection in this due process hearing, as required in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972).

(P.A. 31)

Indeed, this case unquestionably presents the most appealing circumstance of all for applying traditional principles of full faith and credit in a civil rights action under the Reconstruction statutes. As a result of this Court's opinion in *Patsy v. Board of Regents*, 457 U.S. 496 (1982) (exhaustion of state administrative remedies not required in actions under § 1983), the decision to litigate the charge of racial discrimination in the state proceeding rested solely with respondent. Although respondent could have avoided any state action on his Reconstruction civil rights claim simply by litigating it in federal court in the first place, he deliberately and voluntarily invoked the state forum and vigorously litigated the issue of racial discrimination there as an affirmative defense to his proposed termination. In a searching review of the evidence revealed in lengthy findings of fact, the Administrative Law Judge found, however, that respondent's proposed termination was for valid disciplinary reasons and was not racially motivated. This finding was affirmed on appeal to the Agency Head. Judicial

review of the adverse finding was available, but respondent did not avail himself of the opportunity.

The findings of the state agency adjudication in this case are entitled to preclusive effect in Tennessee courts under Tennessee rules of preclusion. Respondent should not be permitted now to flout state law and litigate the issues yet again in a federal forum. To do so would contravene all of the policy considerations justifying traditional principles of preclusion and their adoption as national policy through principles of full faith and credit.

**B. Traditional Principles Of Full Faith And Credit Apply To The Final Judgment Of A State Agency Acting In A Judicial Capacity.**

**1. This Court Has Never Recognized An Artificial Distinction Between State Agency Adjudications And State Court Adjudications For Full Faith And Credit Purposes.**

This Court has never deviated from the principle that state agency adjudications are entitled to the same issue preclusion effect in other courts as they enjoy in the courts of the rendering jurisdiction. *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943); *Chicago R.I. & P. Ry. v. Schenck*, 270 U.S. 611 (1926). Justice Stevens' statement on behalf of the plurality in *Thomas* could hardly have been more explicit: "To be sure, . . . the factfindings of state administrative tribunals are entitled to the same res judicata effect in the second State as findings by a court." 448 U.S. at 281. In the concurring and dissenting opinions in *Thomas*, not a single member of this Court expressed any disagreement with this statement of well-established law. The Sixth Circuit's ruling that full faith and credit

"does not require federal courts to defer to the unreviewed findings of state administrative agencies," *Elliott v. University of Tennessee*, 766 F.2d 982, 990 (6th Cir. 1985), is simply a refusal to recognize what this Court has already recognized for at least six decades.<sup>9</sup>

Both the full faith and credit clause of the Constitution, article IV, § 1, and the federal full faith and credit statute, 28 U.S.C. § 1738 (1982), require that state "[a]cts, records and judicial proceedings" be given the same full faith and credit as they enjoy in the courts of the rendering state. As this Court stressed in *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943),

[w]hether the proceeding before . . . [a state agency acting in a judicial capacity is] regarded as a "judicial proceeding", or its award is a "record" within the meaning of the full faith and credit clause and the Act of Congress, the result is the same. For judicial proceedings and records of the state are both required to have "such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

*Id.* at 443.

Under this nation's federal scheme of government, a state is free to exercise its judicial power through its courts or, if it sees fit, through its executive and adminis-

9. The decision of the Sixth Circuit refusing to give full faith and credit to the state agency adjudication is inconsistent with the weight of post-*Allen* lower court authority. See *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42 (2d Cir. 1985); *Steffen v. Housewright*, 665 F.2d 245 (8th Cir. 1981); *Snow v. Nevada Dep't of Prisons*, 543 F. Supp. 752 (D. Nev. 1982); *O'Connor v. Mazzullo*, 536 F. Supp. 641 (S.D.N.Y. 1982); *Gear v. City of Des Moines*, 514 F. Supp. 1218 (S.D. Iowa 1981). But see *Moore v. Bonner*, 695 F.2d 799 (4th Cir. 1982).

trative agencies. The judgments of such agencies, acting judicially, are entitled to the same preclusive effect as they enjoy in the state's courts because the proceedings are in fact "judicial proceedings" of the state within the meaning of the full faith and credit clause and statute. The very purpose of the full faith and credit clause and statute is to put national sanction behind state policies with respect to the effect of a judgment. See *Riley v. New York Trust Co.*, 315 U.S. 343, 349 (1942). That purpose can be fully realized only if the force and effect of a judgment, whether rendered by a court or by a state agency acting in a judicial capacity, is determined according to the law of the state of rendition. The decision of the Sixth Circuit denies full faith and credit to the very decisions of Tennessee courts holding that state agency adjudications are entitled to preclusive effect in Tennessee courts.

The State of Tennessee has empowered its agencies to act in a judicial capacity to adjudicate contested cases in which a person's legal rights are required by constitutional or statutory provision to be determined prior to proposed agency action. See *Tenn. Code Ann.* § 4-5-102(3) (1985). The Sixth Circuit concluded, however, that "state determination of issues relevant to constitutional adjudication is not an adequate substitute for full access to federal court." *Elliott*, 766 F.2d at 992. There is no support for this conclusion in decisions of this Court. *Allen* and *Migra* unequivocally laid to rest any notion that every person is entitled to one unencumbered opportunity to litigate a federal right in federal court "regardless of the legal posture in which the federal claim arises." *Allen*, 449 U.S. at 103.

Indeed, *Allen* and *Migra* are vivid illustrations of this Court's confidence in the ability of the states to vindicate

federal rights. When, as here, an agency adjudication is provided by state law for the express purpose of protecting an individual's constitutional and statutory rights prior to agency action, there is absolutely no reason to distrust the adjudication. Moreover, according full faith and credit to the state agency adjudication in this case in no way undermines full access to federal court. The decision to litigate the issue of racial discrimination in the state proceeding rested solely with respondent. If respondent wanted full access to federal court, it was his for the taking.

This Court has recognized previously that principles of issue preclusion apply to adjudications by agencies using procedural formalities approximating those of courts. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966), this Court explicitly rejected the notion that principles of issue preclusion do not apply to agency adjudications:

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

384 U.S. at 422. Applying this principle to the facts of *Utah*, this Court concluded:

[T]he Board was acting in a judicial capacity . . . the factual disputes resolved were clearly relevant to issues properly before it, and both parties had a full and fair opportunity to argue their version of the facts and an opportunity to seek court review of any adverse findings. There is, therefore, neither need nor justification for a second evidentiary hearing on these matters already resolved as between these two parties.

*Id.* This Court's recognition that principles of issue preclusion are applicable to agency adjudications has been extensively followed in the courts of appeals<sup>10</sup> and was noted recently by this Court in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 485 n.26 (1982).

In this case, petitioners seek application of issue preclusion<sup>11</sup> to bar respondent's attempt to relitigate

10. See, e.g., *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969); *Delamater v. Schweiker*, 721 F.2d 50 (2d Cir. 1983); *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (3d Cir. 1977), cert. denied, 434 U.S. 1062 (1978); *Pettus v. American Airlines, Inc.*, 587 F.2d 627 (4th Cir. 1978), cert. denied, 444 U.S. 883 (1979); *Painters Dist. Council No. 38 v. Edgewood Contracting Co.*, 416 F.2d 1081 (5th Cir. 1969); *International Wire v. Local 38, IBEW*, 357 F. Supp. 1018 (N.D. Ohio 1972), aff'd, 475 F.2d 1078 (6th Cir.), cert. denied, 414 U.S. 867 (1973); *Bowen v. United States*, 570 F.2d 1311 (7th Cir. 1978); *United States v. Karlen*, 645 F.2d 635 (8th Cir. 1981); *United Farm Workers v. Arizona Agricultural Employment Relations Board*, 669 F.2d 1249 (9th Cir. 1982); *McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910 (10th Cir. 1976).

Of particular significance here is the holding of the Ninth Circuit in the *United Farm Workers* case that state agency adjudications are entitled to full faith and credit in other states:

It is settled that if an administrative agency acts in a judicial capacity, its judgments are entitled to recognition and enforcement pursuant to the full faith and credit clause. *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22, 86 S.Ct. 1545, 1559-1560, 16 L.Ed.2d 642 (1966). . . . The ultimate question in full faith and credit analysis is one of *res judicata*. Thus, decisions of the courts or administrative agencies of one state are entitled to the same *res judicata* effect in all other states as they enjoy in the state of rendition.

669 F.2d at 1255.

11. In *Migra v. Warren City School District*, 465 U.S. 75 (1983), this Court defined the terms "issue preclusion" and "claim preclusion" as follows:

Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. . . . This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect

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the very same issues fully and fairly litigated before a state agency acting in a judicial capacity and with the same procedural formalities as a federal or state court. The fact that the Administrative Law Judge in this case was not empowered to dispose of respondent's claims under the Reconstruction statutes in no way bars application of full faith and credit to the issues actually litigated and decided in the state proceeding. See *Marrese v. American Academy of Orthopaedic Surgeons*, ..... U.S. ...., 105 S.Ct. 1327 (1985). The due process hearing conducted in this case was unquestionably a judicial proceeding of the State of Tennessee. The final agency judgment with respect to issues actually litigated in the proceeding is entitled, therefore, to the same full faith and credit which it enjoys in Tennessee courts.

## 2. Denial Of Full Faith And Credit To The Final Agency Judgment In This Case Would Seriously Undermine The Integrity Of State Agency Adjudications Conducted For The Purpose Of Protecting Fourteenth Amendment Due Process Interests.

During the past fifty years, administrative agencies at both the federal and state level have become essen-

Footnote continued—

of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar.

*Id.* at 77 n.1.

Petitioners seek issue preclusion—not claim preclusion—in this case and seek such preclusion without regard to which party prevails in the prior adjudication. If, for example, respondent had prevailed on the issue of racial discrimination, petitioners maintain that the adjudication would bar petitioners from relitigating that issue in a subsequent federal court action under the Reconstruction statutes.

tially a fourth branch of government without which the legislative, executive, and judicial branches could not function adequately. In particular, the adjudicatory role of administrative agencies has increased dramatically. As Justice Jackson once stated: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952).

A significant increase in state agency adjudications in recent years is particularly pronounced in the area of public employment. In *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972), this Court ruled that "[w]hen protected . . . [Fourteenth Amendment] interests are implicated, the right to some kind of prior hearing is paramount." Thus, any proposed action by state agencies which threatens or even potentially threatens an employee's constitutionally protected liberty and property interests triggers the requirement of an adjudication to protect those interests. In Tennessee and thirty-one other jurisdictions which have adopted the Uniform Law Commissioners' Model Administrative Procedures Act,<sup>12</sup> an em-

12. See Ala. Code § 41-22-12 *et seq.* (1982); Ark. Stat. Ann. § 5-709 (1976); Conn. Gen. Stat. Ann. § 4-177 (West Supp. 1985); Del. Code Ann. tit. 29, § 10121 *et seq.* (1983); D.C. Code Ann. § 1-1509 (1981); Fla. Stat. Ann. § 120-57 (West 1982); Ga. Code Ann. § 50-13-13 (1981); Hawaii Rev. Stat. § 91-9 (1976); Idaho Code § 67-5209 (1980); Ill. Rev. Stat. ch. 27, § 1010 (1981); Iowa Code Ann. § 17A.12 (West 1978); La. Rev. Stat. Ann. § 49:955 (West Supp. 1985); Me. Rev. Stat. Ann. tit. 5, § 9051 *et seq.* (1979); Md. State Gov't Code Ann. § 10-201 *et seq.* (1984); Mich. Comp. Laws Ann. § 24-24.271 *et seq.* (1981); Mo. Ann. Stat. § 536.070 (Vernon Supp. 1985); Mont. Code Ann. § 2-4-601 *et seq.* (1979); Neb. Rev. Stat. § 84-913 *et seq.* (1981); Nev. Rev. Stat. § 233B.121 *et seq.* (1981); N.H. Rev. Stat. Ann. § 541-A:16 (Supp. 1985); N.Y. Administrative Procedure Act

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ployee is entitled to an adjudication virtually identical to a civil trial in state or federal court. See Tenn. Code Ann. §§ 4-5-301 through -323 (1985). Virtually every judgment resulting from these formal adjudications could be the subject of a collateral attack in federal court. When an employee chooses, as respondent did in this case, to invoke the trial-like proceedings of a state agency adjudication to defend his liberty and property interests, the issues fully litigated and decided there must be afforded full faith and credit in federal courts in order to preserve the integrity of the state adjudicatory process. Denial of full faith and credit to the final state agency judgment would render the process futile and seriously undermine the role of state agency adjudication in resolving disputes between public employers and employees.

The policies justifying preclusion—judicial economy, reliance on adjudication, avoiding inconsistent results, relieving the parties of the cost and vexation of multiple litigation—as well as the policies of comity and federalism supporting full faith and credit, are equally applicable to agency adjudications and court adjudications. See generally K. Davis, *Administrative Law Treatise* § 21:2 (1983); Restatement (Second) of Judgments § 83 (1982). In this particular case, these policy considerations are acutely implicated in view of respondent's voluntary submission of the issue of racial discrimination for adjudication in the state agency, the protracted and costly nature

Footnote continued—

§ 301 *et seq.* (McKinney 1984); N.C. Gen. Stat. § 150A-23 *et seq.* (1983); Okla. Stat. Ann. tit. 75, § 310 (West 1976); Or. Rev. Stat. § 183.413 *et seq.* (1985); R.I. Gen. Laws § 42-35-9 (1984); S.D. Comp. Laws Ann. § 1-26-16 *et seq.* (1980); Vt. Stat. Ann. tit. 3, § 809 (1972); Wash. Rev. Code Ann. § 34.04.090 *et seq.* (1965); W.Va. Code § 29A-5-1 *et seq.* (1980); Wis. Stat. Ann. § 227.07 (West 1982); Wyo. Stat. § 16-3-107 (1982).

of the adjudication, and the state's interest in preserving the integrity of its contested case adjudications. As this Court stated in *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525-26 (1931):

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.

The public policies embodied in traditional principles of full faith and credit dictate that this litigation come to an end and that respondent be precluded from relitigating issues he voluntarily submitted for full adjudication in the state agency.<sup>13</sup>

13. According full faith and credit to state agency adjudications in subsequent civil rights actions under the Reconstruction statutes is in no way dependent upon resolution of the Title VII question also presented in this case. The contrary opinion of the Sixth Circuit completely ignores this Court's repeated admonitions that the Reconstruction statutes and Title VII provide separate, distinct, and independent avenues of relief for alleged employment discrimination. See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

The Reconstruction statutes and Title VII differ markedly in terms of coverage, preconditions to a federal court action, applicable limitations period, and relief available upon proof of a violation. See generally 2 J. Cook & J. Sobieski, *Civil Rights Actions* ¶¶ 4.09, 5.04, 7.04 (1987). Moreover, the Reconstruction statutes are certainly not restricted to claims of alleged employment discrimination. Yet, only in the area of employment discrimination can any argument be made for identical full faith and credit treatment under the Reconstruction statutes and Title

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## II. TRADITIONAL PRINCIPLES OF FULL FAITH AND CREDIT APPLY IN TITLE VII ACTIONS TO ISSUES FULLY AND FAIRLY LITIGATED SOLELY AT THE INSISTENCE OF THE AGGRIEVED EMPLOYEE BEFORE A STATE AGENCY ACTING IN A JUDICIAL CAPACITY OUTSIDE THE TITLE VII ENFORCEMENT SCHEME.

### A. Title VII Actions Are Not Categorically Exempt From Traditional Principles Of Full Faith And Credit.

In *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), this Court held that traditional principles of full faith and credit apply to state court judgments in subsequent Title VII actions. After a careful review of the language and legislative history of Title VII, this Court expressly rejected the notion that Congress intended to create an absolute right to relitigate in federal court issues resolved by a state court. On the contrary, finding that Congress did not intend that Title VII supersede the principles of comity and repose embodied in the full faith and credit statute, this Court concluded that full faith and credit applies to a state court judgment affirming, without de novo review, the findings of a Title VII state deferral agency.

#### Footnote continued—

VII. To do so would lead to the anomalous result that different claims arising under the Reconstruction statutes—conceivably involving the very same factual context—would be subject to radically different preclusion effect, notwithstanding the absence of any indication in the Reconstruction statutes that such a distinction should be made. *Id.* at ¶ 5.04.

**B. No Provision Of Title VII Required Respondent To Litigate The Issue Of Racial Discrimination In The State Agency Proceeding; Nor Does Any Provision Of Title VII Specify The Effect Of The Final Agency Judgment.**

A principal teaching of this Court's decision in *Kremer*, as well as *Allen* and *Migra*, is that an exception to full faith and credit "will not be recognized unless a later statute contains an express or implied partial repeal." *Kremer*, 456 U.S. at 468. Because there can be no claim that Title VII expressly repeals the full faith and credit statute, any repeal must be implied. As stressed in *Allen*, *Migra*, and *Kremer*, however, repeals by implication are not favored. See *Kremer*, 456 U.S. at 468. Indeed, in *Kremer* this Court recognized only two well-established categories of repeal by implication: (1) where the provisions of two acts are in irreconcilable conflict; and (2) where a later act covers the entire subject of an earlier one and clearly is intended as a substitute. See *id.*

Considering the relationship between Title VII and the full faith and credit statute with respect to a state court judgment, this Court emphasized in *Kremer* that "[n]o provision of Title VII requires claimants to pursue in state court an unfavorable state administrative action, nor does the Act specify the weight a federal court should afford a final judgment by a state court if such a remedy is sought." *Kremer*, 453 U.S. at 469. Finding no clear and manifest incompatibility, therefore, between Title VII and the full faith and credit statute, this Court concluded that nothing in the language or operation of Title VII impliedly repeals the statutory mandate of full faith and credit.

This case presents an even more compelling circumstance than *Kremer* for finding no repeal by implication of the statutory command of full faith and credit. Nothing in Title VII obligated respondent to litigate the issue of racial discrimination in the state forum. Respondent did not invoke the state proceedings pursuant to a state antidiscrimination law.<sup>14</sup> Rather, exercising his right as a public employee to defend his liberty and property interests under the Fourteenth Amendment, respondent invoked a due process hearing under the Tennessee Uniform Administrative Procedures Act to challenge his proposed termination. Once invoked, the Act required the University to afford respondent a formal, trial-like hearing. Respondent fully litigated the issue of racial discrimination in the due process hearing as an affirmative defense to the disciplinary charges against him. Respondent thus made a critical choice to litigate the issue of racial discrimination outside the Title VII enforcement scheme. Nothing in Title VII or any other provision of law required him to do so.

Moreover, nothing in Title VII purports to specify the effect a federal court should afford the final agency judgment in this case. Title VII only specifies that the EEOC must afford "substantial weight" to the findings of state agencies which are charged with the enforcement

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14. Title VII requires deferral only to those state agencies which by state law are empowered "to grant or seek relief from" the alleged unlawful employment practice. See 42 U.S.C. § 2000e-5(c), (d) (1982). In Tennessee, the required deferral agency is the Tennessee Human Rights Commission, which is authorized by the provisions of Tenn. Code Ann. § 4-21-202 (1985) to enforce the state's law against employment discrimination.

of state antidiscrimination laws.<sup>15</sup> This provision could be construed, therefore, as an implied repeal of the full faith and credit statute only as it applies to determinations by Title VII deferral agencies. See *Kremer*, 456 U.S. at 470 n.7. No provision of Title VII prescribes the effect of a state agency adjudication voluntarily invoked by an aggrieved employee outside the Title VII enforcement scheme, and thus nothing in Title VII can be construed as an implied repeal of the full faith and credit due such an adjudication.

As established earlier with respect to respondent's action under the Reconstruction statutes, see pp. 22 to 30 *supra*, full faith and credit applies to prior state judicial proceedings whether conducted by a state court or by a state agency acting in a judicial capacity. This Court's decision in *Kremer* unquestionably establishes that federal courts must apply full faith and credit principles in Title VII actions unless Title VII itself impliedly repeals the statutory command. Because nothing in Title VII required respondent to invoke the state proceeding conducted in this case or to litigate the issue of racial discrimination there, and because nothing in Title VII specifies the effect of the resulting judgment, nothing in the language or operation of Title VII can in any way be viewed in this case as an express or implied repeal of the statutory mandate of full faith and credit. Nothing

15. The provision of Title VII requiring the EEOC to give "substantial weight" to findings made in state proceedings applies only to those state proceedings which Title VII itself requires to be pursued. See 42 U.S.C. § 2000e-5(b) (1982) ("[T]he Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section [emphasis added].")

more needs to be decided to hold that full faith and credit applies to the final agency judgment in this particular case.<sup>16</sup>

### C. Full Faith And Credit Applies To Issues Properly Before And Fully And Fairly Adjudicated By A State Agency Acting In A Judicial Capacity.

The fact that respondent litigated the issue of racial discrimination in a state forum without jurisdiction to resolve respondent's Title VII claim does not bar application of issue preclusion in this case. There is no question that the issue of racial discrimination was properly before and wholly within the competence of the state tribunal. Under governing state law, the University was

16. Most of the post-*Kremer* lower court decisions on the preclusive effect of a judicially unreviewed agency adjudication arise within the Title VII enforcement scheme and thus involve state deferral agencies. Compare, e.g., *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 768 F.2d 842 (7th Cir. 1985), petition for cert. filed, ..... U.S.L.W. .... (U.S. Dec. 23, 1985) (No. 85-6094) (preclusive effect); and *Parker v. National Corp. for Housing Partnerships*, 619 F. Supp. 1061 (D.D.C. 1985) (same); with *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2d Cir. 1985) (no preclusive effect); *Reedy v. Florida*, 605 F. Supp. 172 (N.D. Fla. 1985) (same); and *Jones v. Progress Lighting Corp.*, 595 F. Supp. 1031 (E.D. Pa. 1984) (same).

In the few post-*Kremer* decisions on the preclusive effect of a judicially unreviewed agency adjudication outside the Title VII enforcement scheme, the issue of employment discrimination apparently was not litigated in the prior adjudication—either because the employee chose not to raise it there or because it could not be properly raised there. Compare *O'Hara v. Board of Education*, 590 F. Supp. 696 (D.N.J. 1984), *aff'd mem.*, 760 F.2d 259 (3d Cir. 1985) (preclusive effect); with *Heath v. John Morrell & Co.*, 78 F.2d 245 (5th Cir. 1985) (no preclusive effect); and *Snow v. Nevada Dep't of Prisons*, 543 F. Supp. 752 (D. Nev. 1982) (same). In this case, respondent chose to litigate the issue of racial discrimination fully in the due process hearing, and the issue was properly before the tribunal as respondent's affirmative defense to the disciplinary charges against him.

obligated to prove its disciplinary charges against the respondent by a preponderance of the evidence. Respondent, on the other hand, was entitled to defend against the disciplinary charges by showing that the University acted "[i]n violation of constitutional or statutory provisions." Tenn. Code Ann. § 4-5-322(h)(1) (1985). Respondent in fact chose to defend on the ground that the disciplinary charges were racially motivated, and pursuant to the requirements of state law, the Administrative Law Judge admitted evidence on the issue of discrimination as an affirmative defense to the disciplinary charges against respondent. In adjudicating the issue of racial discrimination, therefore, the Administrative Law Judge was undeniably acting within the scope of his conceded competence to determine respondent's affirmative defense even though he could not determine respondent's Title VII and Reconstruction civil rights claims.

As this Court strikingly reaffirmed in its recent decision in *Marrese v. American Academy of Orthopaedic Surgeons*, ..... U.S. ...., 105 S. Ct. 1327 (1985), absent an exception to the full faith and credit statute, state law determines the issue preclusion effect of a prior state judgment in a subsequent action even if it involves a claim within the exclusive jurisdiction of the federal courts. *Marrese* concerned a federal antitrust action commenced after the dismissal of a prior state court action. The court of appeals ruled as a matter of federal law that dismissal of the state court action barred the subsequent federal antitrust action. This Court held, however, that the full faith and credit statute requires the preclusive effect of a state judgment to be decided according to the law of the state in which the judgment was rendered. Significantly, this Court readily recognized that *Kremer* itself

implies that "absent an exception to § 1738, state law determines at least the issue preclusive effect of a prior state judgment in a subsequent action involving a claim within the exclusive jurisdiction of the federal courts." *Marrese*, ..... U.S. at ....., 105 S. Ct. at 1332. Although expressly declining to decide in *Kremer* whether subject matter jurisdiction of Title VII claims is exclusive to the federal courts, see *Kremer*, 456 U.S. at 480 n.20, this Court held that full faith and credit required dismissal of *Kremer's* Title VII action because the issue of employment discrimination had been fully and fairly litigated in the state proceedings. Even if claim preclusion did not apply, therefore, issue preclusion required dismissal of the Title VII action. See *id.* at 481 n.22.

The issue of racial discrimination was fully and fairly litigated in this case before a tribunal fully competent to adjudicate the issue as an affirmative defense to the proposed agency action. Because there is no exception to the full faith and credit statute for a state agency adjudication outside the Title VII enforcement scheme, state law is determinative of the issue preclusion effect of the adjudication in this case and precludes respondent from litigating the issue of racial discrimination yet again in a federal forum.<sup>17</sup>

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17. Petitioners seek only issue preclusion to bar respondent from relitigating issues actually litigated before the agency. Petitioners do not seek claim preclusion. Therefore, if the tribunal had found that respondent's proposed termination was racially motivated, respondent would not be barred from seeking supplemental relief in a Title VII action. Cf. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980) (employee who prevailed before state deferral agency entitled to bring Title VII action for supplemental relief). Petitioners would be barred, however, from relitigating the issue of the reason for respondent's proposed termination.

**D. The Issue Of Racial Discrimination Was Fully And Fairly Litigated In The State Proceeding.**

Although full faith and credit applies to a state agency adjudication outside the Title VII enforcement scheme, a federal court must be satisfied that the party against whom issue preclusion is sought had a full and fair opportunity to litigate in the state forum. In *Kremer*, however, this Court held that "where we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." 456 U.S. at 481. This Court found in *Kremer* that the issue of employment discrimination had been litigated fully and fairly in the state forum and that the aggrieved employee was not entitled to litigate it again in a federal forum. The facts of this case, even more than those of *Kremer*, demand the finding that a full and fair litigation occurred in the state forum and that issue preclusion prohibits respondent from relitigating the issue of racial discrimination in federal court.

In *Kremer*, the aggrieved employee's charge of employment discrimination was referred by the EEOC to the New York state agency charged with enforcing that state's antidiscrimination laws. The agency conducted a probable cause investigation of the employee's charge but never conducted an adversarial hearing in a procedural setting even approximating that of a state or federal court. The result of the agency's investigation was a finding of no probable cause to believe the charge was true. After an unsuccessful administrative appeal, the employee filed a petition in state court to set aside the adverse agency finding. The state court decided, however, that the agency

finding was not arbitrary or capricious and, on that basis, affirmed the finding without de novo review. This Court in turn held that the state court judgment affirming the agency finding was entitled to the same preclusive effect it enjoyed in the New York state courts, even though it was rendered after limited judicial review. Thus, while the agency proceedings in *Kremer* fell far short of the formality of a state or federal court action, the agency finding of no probable cause precluded relitigation of the issue of employment discrimination because the agency's investigation, coupled with limited judicial review, satisfied the minimum due process necessary for full faith and credit to apply. See *Kremer*, 456 U.S. at 484-485 & n.26.

The agency proceedings in this case were far more extensive and formal than those in *Kremer*. The proceedings here were conducted in virtually the same manner as a trial in state or federal court. Respondent was represented by counsel throughout the proceedings and fully exercised the array of procedural rights available to him under the Tennessee Uniform Administrative Procedures Act—discovery, compulsory process, examination and cross-examination of witnesses, and filing of pleadings, briefs, and proposed findings of fact and conclusions of law. Indeed, respondent has never challenged the adequacy or fairness of the procedures under which the hearing was conducted, nor did he exercise his statutory right to seek judicial review of the adverse agency finding. Judicial review would have added nothing to the full and fair litigation respondent enjoyed in the agency adjudication.

Beyond the fullness and fairness of the procedural protections themselves, respondent unquestionably had a full and fair opportunity to litigate the issue of racial

discrimination. Through his counsel, a prominent civil rights attorney in Tennessee, respondent fully litigated the issue as respondent's primary, if not sole, defense to the disciplinary charges. Respondent's counsel questioned each of the 104 witnesses, 93 of whom were called by respondent, concerning all the alleged incidents of racial discrimination by all the petitioners.<sup>18</sup> In particular, respondent's counsel cross-examined the Dean of the Agricultural Extension Service and respondent's immediate supervisor for more than thirty hours each concerning the incidents from which the disciplinary charges arose and any racial motivation for the charges.

The allegations of racial discrimination which respondent fully litigated in the agency adjudication mirrored the allegations of individual discrimination in his federal court complaint. The reason is clear. The purpose of respondent's federal court complaint was to enjoin the University from taking any employment action against him on the basis of the incidents underlying the disciplinary charges. Unlike a private employee, however, respondent had the opportunity to prevent the proposed employment action by exercising his due process right as a public employee to challenge the reasons for his proposed termination. Respondent's incentive to litigate the issue of racial discrimination in the due process hearing was clearly as great, therefore, as it would have been in a Title VII action.

The Administrative Law Judge concluded that respondent's burden in proving his affirmative defense of racial

18. Most of the petitioners testified in the hearing. Respondent subpoenaed all of the petitioners but chose not to call some of them.

discrimination was the same as a Title VII claimant's burden of proving pretext under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (P.A. 171) The University's burden, on the other hand, was to prove the disciplinary charges by a preponderance of the evidence. The Administrative Law Judge found that the University had satisfied that burden as to four of the disciplinary charges. (P.A. 166-170) The University carried a greater burden, therefore, than the employer in a Title VII action, who under *Burdine* and *McDonnell Douglas* merely must articulate a legitimate non-discriminatory reason for the employment action and never bears the burden of persuasion. Thus, while respondent's burden in the contested case hearing was no greater than in a Title VII action, the University's burden was far greater.

The state agency adjudication in this case offered respondent the same procedural formalities within which to litigate the issue of racial discrimination as a federal court and far greater formalities than an EEOC or state deferral agency probable cause investigation. Failure to apply issue preclusion in this case would allow respondent two chances to litigate the issue of racial discrimination in a formal judicial proceeding. Denial of preclusive effect to the final agency judgment in this case, therefore, would not only undermine the integrity of the adjudicatory process which the State of Tennessee has provided for the purpose of protecting Fourteenth Amendment interests affected by agency action, but also burden the federal court with needlessly relitigating an issue already litigated fully and at great expense to the State of Tennessee. All of the policy considerations underlying rules of preclusion and embodied in full faith and credit—ju-

dicial economy, reliance on adjudication, avoiding inconsistent results, relieving the parties of the cost and vexation of multiple litigation, comity and federalism—dictate that the final agency judgment in this case be given issue preclusion effect in respondent's Title VII action.

Having purposefully departed from the Title VII enforcement scheme and having freely chosen the state agency adjudication as the forum in which to litigate the issue of racial discrimination, respondent is fairly bound by the law of Tennessee which holds that one full and fair opportunity to litigate an issue is enough. Because issues decided by the state agency acting in a judicial capacity cannot be relitigated under the law of Tennessee, those issues cannot be relitigated in a federal court. Traditional principles of full faith and credit require reversal of the Sixth Circuit's judgment completely disregarding Tennessee rules of preclusion in this case.

## CONCLUSION

For the reasons stated, the judgment and opinion of the Court of Appeals for the Sixth Circuit should be reversed and the final agency judgment in this case given issue preclusion effect in respondent's federal court action under the Reconstruction civil rights statutes and Title VII.

Respectfully submitted,

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**APPENDIX**

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**APPENDIX A**

**Constitutional Provision**

J.S. Const. art. IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

## APPENDIX B

### Federal Statutes

28 U.S.C. § 1738 (1982)

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. § 2000e-5 (b), (c), (d) (1982)

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of

the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as

promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision

of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

## APPENDIX C

### State Statutes

Tenn. Code Ann. § 4-5-102(3) (1985)

"Contested case" means a proceeding, including a declaratory proceeding, in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing. Such proceeding may include rate making; price fixing; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; the grant or denial of licenses, permits or franchises where the licensing board is not required to grant the license, permit or franchise upon the payment of a fee or the finding of certain clearly defined criteria; and suspensions of, revocations of, and refusals to renew licenses. An agency may commence a contested case at any time with respect to a matter within the agency's jurisdiction;

Tenn. Code Ann. §§ 4-5-301 through -323 (1985)

**4-5-301. Conduct of contested cases.**—(a) In the hearing of any contested case, the proceedings or any part thereof:

(1) Shall be conducted in the presence of the requisite number of members of the agency as prescribed by law and in the presence of an administrative judge or hearing officer; or

(2) Shall be conducted by an administrative judge or hearing officer sitting alone.

(b) It shall be the duty of the administrative judge or hearing officer to preside at the hearing, rule on questions of the admissibility of evidence, swear witnesses, advise the agency members as to the law of the case, and insure that the proceedings are carried out in accordance with the provisions of this chapter, other applicable law and the rules of the respective agency. Provided, however, at no time shall the administrative judge or hearing officer hearing a case with agency members under subsection (a) take part in the determination of a question of fact unless the administrative judge or hearing officer is an agency member. An administrative judge or hearing officer shall, upon his own motion, or timely motion of a party, decide any procedural question of law.

(c) The agency shall determine whether a contested case shall be conducted by an administrative judge or hearing officer sitting alone or in the presence of members of the agency; provided, however, that administrative judges or hearing officers employed in the office of the secretary of state shall not be required to conduct a contested case sitting alone in the absence of agreement between the agency and the secretary of state.

(d) Contested cases under this section may be conducted by administrative judges or hearing officers employed in the office of the secretary of state upon the request of the agency being presented to the secretary of state and the request being granted.

(e) Any agency not authorized by law to have a contested case conducted by an administrative judge, hearing officer or similar officer from the agency shall direct that the proceedings or any part thereof be

conducted by an administrative judge or hearing officer employed in the office of the secretary of state. [Acts 1982, ch. 874, § 37; 1984, ch. 728, § 11.]

**4-5-302. Disqualification of judge, hearing officer, etc.—Substitutions.**—(a) Any administrative judge, hearing officer, or agency member shall be subject to disqualification for bias, prejudice, interest, or any other cause provided in this chapter or for any cause for which a judge may be disqualified.

(b) Any party may petition for the disqualification of an administrative judge, hearing officer or agency member promptly after receipt of notice indicating that the individual will serve or, if later, promptly upon discovering facts establishing grounds for disqualification.

(c) A party petitioning for the disqualification of an agency member shall not be allowed to question the agency member concerning the grounds for disqualification at the hearing or by deposition unless ordered by the administrative judge or hearing officer conducting the hearing and agreed to by the agency member.

(d) The individual whose disqualification is requested shall determine whether to grant the petition, stating facts and reasons for the determination.

(e) If a substitute is required for an individual who becomes unavailable as a result of disqualification or any other reason, the substitute shall be appointed, unless otherwise provided by law:

(1) By the governor, if the unavailable individual is a cabinet member or elected official except that the

speaker of the senate and house of representatives shall appoint a substitute for individuals elected by the general assembly; or

(2) By the appointing authority, if the unavailable individual is an appointed official.

(f) Any action taken by a duly appointed substitute for an unavailable individual shall be as effective as if taken by the unavailable individual. [Acts 1982, ch. 874, § 38.]

**4-5-303. Separation of functions.**—(a) A person who has served as an investigator, prosecutor or advocate in a contested case may not serve as an administrative judge or hearing officer or assist or advise an administrative judge or hearing officer in the same proceeding.

(b) A person who is subject to the authority, direction, or discretion of one who has served as investigator, prosecutor, or advocate in a contested case may not serve as an administrative judge or hearing officer or assist or advise an administrative judge or hearing officer in the same proceeding.

(c) A person who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may not serve as an administrative judge or hearing officer or assist or advise an administrative judge or hearing officer in the same proceeding.

(d) A person may serve as an administrative judge or hearing officer at successive stages of the same contested case, unless a party demonstrates grounds for disqualification in accordance with § 4-5-302.

(e) A person who has participated in a determination of probable cause or other equivalent preliminary determination or participated or made a decision which is on administrative appeal in a contested case may serve as an agency member in the contested case where authorized by law and not subject to disqualification or other cause provided in this chapter. [Acts 1982, ch. 874, § 39.]

**4-5-304. Ex parte communications.**—(a) Unless required for the disposition of ex parte matters specifically authorized by statute an administrative judge, hearing officer, or agency member serving in a contested case proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any person without notice and opportunity for all parties to participate in the communication.

(b) Notwithstanding subsection (a), an administrative judge, hearing officer or agency member may communicate with agency members regarding a matter pending before the agency or may receive aid from staff assistants, members of the attorney general's staff, or a licensed attorney, if such persons do not receive ex parte communications of a type that the administrative judge, hearing officer, or agency members would be prohibited from receiving, and do not furnish, augment, diminish, or modify the evidence in the record.

(c) Unless required for the disposition of ex parte matters specifically authorized by statute, no party to a contested case, and no other person may communicate, directly or indirectly, in connection with any issue in that proceeding, while the proceeding

is pending, with any person serving as an administrative judge, hearing officer, or agency member without notice and opportunity for all parties to participate in the communication.

(d) If, before serving as an administrative judge, hearing officer or agency member in a contested case, a person receives an ex parte communication of a type that may not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (e).

(e) An administrative judge, hearing officer, or agency member who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the person received an ex parte communication, and shall advise all parties that these matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, upon requesting the opportunity for rebuttal within ten (10) days after notice of the communication.

(f) An administrative judge, hearing officer or agency member who receives an ex parte communication in violation of this section may be disqualified if necessary to eliminate the effect of the communication.

(g) The agency shall, and any party may, report any willful violation of this section to appropriate

authorities for any disciplinary proceedings provided by law. In addition, each agency by rule may provide for appropriate sanctions, including default, for any violations of this section. [Acts 1982, ch. 874, § 41.]

**4-5-305. Representation.**—(a) Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.

(b) Whether or not participating in person, any party may be advised and represented at the party's own expense by counsel or, unless prohibited by any provision of law, other representative. [Acts 1982, ch. 874, § 43.]

**4-5-306. Pre-hearing conferences.**—(a)(1) In any action set for hearing, the administrative judge or hearing officer assigned to hear the case, upon its or his own motion, or upon motion of one of the parties or their qualified representatives, may direct the parties and/or the attorneys for the parties to appear before it or him for a conference to consider:

- (A) The simplification of issues;
- (B) The necessity or desirability of amendments to the pleadings;
- (C) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (D) The limitation of the number of expert witnesses;
- (E) Such other matters as may aid in the disposition of the action.

(2) The administrative judge or hearing officer shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admissions or agreements of the parties, and such order when entered controls the subsequent course of the action, unless modified at the hearing to prevent manifest injustice.

(b) Upon reasonable notice to all parties the administrative judge or hearing officer may convene a hearing or convert a pre-hearing conference to a hearing, to be conducted by the administrative judge or hearing officer sitting alone, to consider argument and/or evidence on any question of law. The administrative judge or hearing officer may render an initial order, as otherwise provided by this chapter, on the question of law.

(c) In the discretion of the administrative judge or hearing officer, all or part of the pre-hearing conference may be conducted by telephone, television, or other electronic means, if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

(d) If a pre-hearing conference is not held, the administrative judge or hearing officer for the hearing may issue a pre-hearing order, based on the pleadings, to regulate the conduct of the proceedings. [Acts 1974, ch. 725, § 8; 1975, ch. 370, §§ 3, 12; 1978, ch. 938, §§ 4, 5; T.C.A., §§ 4-514, 4-5-108(d); Acts 1982, ch. 874, §§ 44, 54.]

**4-5-307. Notice of hearing.**—(a) In a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) In all proceedings the notice shall include:

(1) A statement of the time, place, nature of the hearing, and the right to be represented by counsel;

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held, including a reference to the particular sections of the statutes and rules involved; and

(3) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon timely, written application a more definite and detailed statement shall be furnished ten (10) days prior to the time set for the hearing. [Acts 1974, ch. 725, § 8; 1975, ch. 370, §§ 3, 12; 1978, ch. 938, §§ 4, 5; T.C.A., §§ 4-514, 4-5-108(a), (b); Acts 1982, ch. 874, §§ 45, 54.]

**4-5-308. Filing pleadings, briefs, motions, etc.—Service.**—(a) The administrative judge or hearing officer, at appropriate stages of the proceedings, shall give all parties full opportunity to file pleadings, motions, objections and offers of settlement.

(b) The administrative judge or hearing officer, at appropriate stages of the proceedings, may give all parties full opportunity to file briefs, proposed findings of fact and conclusions of law, and proposed initial or final orders.

(c) A party shall serve copies of any filed item on all parties, by mail or any other means prescribed by agency rule. [Acts 1982, ch. 874, § 46.]

**4-5-309. Default.**—(a) If a party fails to attend or participate in a pre-hearing conference, hearing or other stage of a contested case, the administrative judge or hearing officer, hearing the case alone, or agency, sitting with the administrative judge or hearing officer, may hold the party in default and either adjourn the proceedings or conduct them without the participation of that party, having due regard for the interest of justice and the orderly and prompt conduct of the proceedings.

(b) If the proceedings are conducted without the participation of the party in default the administrative judge or hearing officer, hearing the case alone, shall include in the initial order a written notice of default, otherwise, the agency, sitting with the administrative judge or hearing officer, shall include such written notice of default in the final order. If the proceedings are adjourned and not conducted the administrative judge or hearing officer, hearing the case alone, may render an initial default order, otherwise, the agency, sitting with the administrative judge or hearing officer, may render a final default order. All default orders and notices of default in default orders shall include a written statement of the grounds for the default.

(c) A party may petition to have a default set aside by filing a timely petition for reconsideration as provided in § 4-5-317.

(d) If a party fails to file a timely petition for reconsideration or the petition is not granted, the administrative judge or hearing officer, sitting alone,

or agency, sitting with the administrative judge or hearing officer, shall conduct any further proceedings necessary to complete the contested case without the participation of the defaulting party and shall determine all issues in the adjudication, including those affecting the defaulting party. [Acts 1982, ch. 874, § 47.]

**4-5-310. Intervention.**—(a) The administrative judge or hearing officer shall grant one (1) or more petitions for intervention if:

(1) The petition is submitted in writing to the administrative judge or hearing officer, with copies mailed to all parties named in the notice of the hearing, at least seven (7) days before the hearing;

(2) The petition states facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interest may be determined in the proceeding or that the petitioner qualifies as an intervenor under any provision of law; and

(3) The administrative judge or hearing officer determines that the interests of justice and the orderly and prompt conduct of the proceedings shall not be impaired by allowing the intervention.

(b) The agency may grant one (1) or more petitions for intervention at any time, upon determining that the intervention sought is in the interests of justice and shall not impair the orderly and prompt conduct of the proceedings.

(c) If a petitioner qualifies for intervention, the administrative judge or hearing officer may impose conditions upon the intervenor's participation in the proceedings, either at the time that intervention is

granted or at any subsequent time. Conditions may include:

(1) Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the petition;

(2) Limiting the intervenor's use of discovery, cross-examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

(3) Requiring two (2) or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceedings.

(d) The administrative judge, hearing officer or agency, at least twenty-four (24) hours before the hearing, shall render an order granting or denying each pending petition for intervention, specifying any conditions, and briefly stating the reasons for the order. The administrative judge, hearing officer or agency may modify the order at any time, stating the reasons for the modification. The administrative judge, hearing officer or agency shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties. [Acts 1982, ch. 874, § 48.]

**4-5-311. Discovery—Subpoenas.**—(a) The administrative judge or hearing officer at the request of any party shall issue subpoenas, effect discovery, and issue protective orders, in accordance with the Tennessee Rules of Civil Procedure, except that service in contested cases may be by certified mail in addition to means of service provided by the Tennessee Rules

of Civil Procedure. The administrative judge or hearing officer shall decide any objection relating to discovery under this chapter or the Tennessee Rules of Civil Procedure. Witnesses under subpoena shall be entitled to the same fees as are now or may hereafter be provided for witnesses in civil actions in the circuit court and, unless otherwise provided by law or by action of the agency, the party requesting the subpoenas shall bear the cost of paying fees to the witnesses subpoenaed.

(b) In case of disobedience to any subpoena issued and served under this section or to any lawful agency requirement for information, or of the refusal of any person to testify in any matter regarding which he may be interrogated lawfully in a proceeding before an agency, the agency may apply to the circuit or chancery court of the county of such person's residence, or to any judge or chancellor thereof, for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. Forthwith the court shall cite the respondent to appear and shall hear the matter as expeditiously as possible. If the disobedience or refusal is found to be unlawful, the court shall enter an order requiring compliance. Disobedience of such order shall be punished as contempt of court in the same manner and by the same procedure as is provided for like conduct committed in the course of judicial proceedings.

(c) The agency may promulgate rules to further prevent abuse and oppression in discovery.

(d) Any party to a contested case shall have the right to inspect the files of the agency with respect to the matter and to copy therefrom, except that rec-

ords may not be inspected the confidentiality of which is protected by law. [Acts 1974, ch. 725, §§ 10, 11; 1975, ch. 370, § 4; 1978, ch. 938, §§ 9, 10, 11; T.C.A., §§ 4-516, 4-517, 4-5-110(b), 4-5-111(c); Acts 1982, ch. 874, §§ 49, 50.]

**4-5-312. Procedure at hearing.**—(a) The administrative judge or hearing officer shall regulate the course of the proceedings, in conformity with the pre-hearing order if any.

(b) To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the pre-hearing order.

(c) In the discretion of the administrative judge or hearing officer and agency members and by agreement of the parties, all or part of the hearing may be conducted by telephone, television, or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceedings while it is taking place.

(d) The hearing shall be open to public observation pursuant to the provisions of chapter 44 of title 8 unless otherwise provided by state or federal law. To the extent that a hearing is conducted by telephone, television, or other electronic means the availability of public observation shall be satisfied by giving members of the public an opportunity, at reasonable times, to hear the tape recording and to inspect any transcript

obtained by the agency, except as otherwise provided by § 50-7-701. [Acts 1982, ch. 874, § 51.]

**4-5-313. Rules of evidence—Affidavits—Official notice.—**In contested cases:

(1) The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. The agency shall give effect to the rules of privilege recognized by law and to agency statutes protecting the confidentiality of certain records and shall exclude evidence which in its judgment is irrelevant, immaterial, or unduly repetitious.

(2) At any time not less than ten (10) days prior to a hearing or a continued hearing, any party shall deliver to the opposing party a copy of any affidavit which he proposes to introduce in evidence, together with a notice in the form provided in subdivision (4). Unless the opposing party within seven (7) days after delivery delivers to the proponent a request to cross-examine an affiant, his right to cross-examination of such affiant is waived and the affidavit, if introduced in evidence, shall be given the same effect as if the affiant had testified orally. If an opportunity to cross-examine an affiant is not afforded after a proper request is made as herein provided, the affidavit shall not be admitted into evidence. Delivery for purposes of this section shall mean actual receipt.

(3) The officer assigned to conduct the hearing may admit affidavits not submitted in accordance with this section where necessary to prevent injustice.

(4) The notice referred to in subdivision (2) shall contain the following information and be substantially in the following form:

The accompanying affidavit of (here insert name of affiant) will be introduced as evidence at the hearing in (here insert title of proceeding). (Here insert name of affiant) will not be called to testify orally and you will not be entitled to question him unless you notify (here insert name of the proponent or his attorney) at (here insert address) that you wish to cross-examine him. To be effective your request must be mailed or delivered to (here insert name of proponent or his attorney) on or before (here insert a date seven (7) days after the date of mailing or delivering the affidavit to the opposing party).

(5) Documentary evidence otherwise admissible may be received in the form of copies or excerpts, or by incorporation by reference to material already on file with the agency. Upon request, parties shall be given an opportunity to compare the copy with the original, if reasonably available.

(6) Official notice may be taken of:

(A) Any fact that could be judicially noticed in the courts of this state;

(B) The record of other proceedings before the agency;

(C) Technical or scientific matters within the agency's specialized knowledge; and

(D) Codes or standards that have been adopted by an agency of the United States, of this state or of another state, or by a nationally recognized organization or association.

Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded an opportunity to contest and rebut the facts or material so noticed. [Acts 1974, ch. 725, § 9; 1978, ch. 938, §§ 6-8; T.C.A., §§ 4-515, 4-5-109; Acts 1982, ch. 874, § 52.]

**4-5-314. Final order—Initial order.**—(a) An agency with statutory authority to decide a contested case shall render a final order.

(b) If an administrative judge or hearing officer hears a case alone under § 4-5-301(a)(2), the administrative judge or hearing officer shall render an initial order, which shall become a final order unless reviewed in accordance with § 4-5-315.

(c) A final order, initial order or decision under § 50-7-304 shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed and, if applicable, the action taken on a petition for stay of effectiveness. Findings of fact, if set forth in language that is no more than mere repetition or paraphrase of the relevant provision of law, shall be accompanied by a concise and explicit statement of the underlying facts of record to support the findings. The final order, initial order or decision must also in-

clude a statement of the available procedures and time limits for seeking reconsideration or other administrative relief and the time limits for seeking judicial review of the final order. An initial order or decision shall include a statement of any circumstances under which the initial order or decision may, without further notice, become a final order.

(d) Findings of fact shall be based exclusively upon the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. The agency member's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence.

(e) If an individual serving or designated to serve as an administrative judge, hearing officer or agency member becomes unavailable, for any reason, before rendition of the final order or initial order or decision, a substitute shall be appointed as provided in § 4-5-302. The substitute shall use any existing record and may conduct any further proceedings as is appropriate in the interest of justice.

(f) The administrative judge or hearing officer may allow the parties a designated amount of time after conclusion of the hearing for the submission of proposed findings.

(g) A final order rendered pursuant to subsection (a) or initial order rendered pursuant to subsection (b) shall be rendered in writing within ninety (90) days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f) unless such period is waived or extended with the written consent of all parties or for good cause shown.

(h) The agency shall cause copies of the final order under subsection (a) and the administrative judge or hearing officer shall cause copies of the initial order under subsection (b) to be delivered to each party. [Acts 1982, ch. 874, § 54.]

**4-5-315. Review of initial order.**—(a) The agency upon the agency's motion may, and where provided by federal law or upon appeal by any party shall, review an initial order, except to the extent that:

(1) A statute or rule of the agency precludes or limits agency review of the initial order; or

(2) The agency in the exercise of discretion conferred by statute or rule of the agency:

(A) Determines to review some but not all issues, or not to exercise any review;

(B) Delegates its authority to review the initial order to one or more persons; or

(C) Authorizes one or more persons to review the initial order, subject to further review by the agency.

(b) A petition for appeal from an initial order shall be filed with the agency, or with any person designated for such purpose by rule of the agency, within ten (10) days after entry of the initial order. If the agency on its own motion decides to review an initial order, the agency shall give written notice of its intention to review the initial order within ten (10) days after its entry. The ten-day period for a party to file a petition for appeal or for the agency to give notice of its intention to review an initial order on the agency's own motion shall be tolled by

the submission of a timely petition for reconsideration of the initial order pursuant to § 4-5-317, and a new ten-day period shall start to run upon disposition of the petition for reconsideration. If an initial order is subject both to a timely petition for reconsideration and to a petition for appeal or to review by the agency on its own motion, the petition for reconsideration shall be disposed of first, unless the agency determines that action on the petition for reconsideration has been unreasonably delayed.

(c) The petition for appeal shall state its basis. If the agency on its own motion gives notice of its intent to review an initial order, the agency shall identify the issues that it intends to review.

(d) The person reviewing an initial order shall exercise all the decision-making power that the agency would have had to render a final order had the agency presided over the hearing, except to the extent that the issues subject to review are limited by rule or statute or by the agency upon notice to all parties.

(e) The agency shall afford each party an opportunity to present briefs and may afford each party an opportunity to present oral argument.

(f) Before rendering a final order, the agency may cause a transcript to be prepared, at the agency's expense, of such portions of the proceeding under review as the agency considers necessary.

(g) The agency may render a final order disposing of the proceeding or may remand the matter for further proceedings with instructions to the person who rendered the initial order. Upon remanding a

matter, the agency may order such temporary relief as is authorized and appropriate.

(h) A final order or an order remanding the matter for further proceedings pursuant to this section, shall be rendered and entered in writing within sixty (60) days after receipt of briefs and oral argument, unless that period is waived or extended with the written consent of all parties or for good cause shown.

(i) A final order or an order remanding the matter for further proceedings under this section shall identify any difference between such order and the initial order, and shall include, or incorporate by express reference to the initial order, all the matters required by § 4-5-314(c).

(j) The agency shall cause copies of the final order or order remanding the matter for further proceedings to be delivered to each party and to the administrative judge or hearing officer who conducted the contested case. [Acts 1982, ch. 874, § 55.]

**4-5-316. Stay.**—A party may submit to the agency a petition for stay of effectiveness of an initial or final order within seven (7) days after its entry unless otherwise provided by statute or stated in the initial or final order. The agency may take action on the petition for stay, either before or after the effective date of the initial or final order. [Acts 1982, ch. 874, § 56.]

**4-5-317. Reconsideration.**—(a) Any party, within ten (10) days after entry of an initial or final order, may file a petition for reconsideration, stating the specific grounds upon which relief is requested. However, the filing of the petition shall not be a prerequisite for seeking administrative or judicial review.

(b) The petition shall be disposed of by the same person or persons who rendered the initial or final order, if available.

(c) The person or persons who rendered the initial or final order, which is the subject of the petition, shall, within twenty (20) days of receiving the petition, enter a written order either denying the petition, granting the petition and setting the matter for further proceedings; or granting the petition and issuing a new order, initial or final, in accordance with § 4-5-314. If no action has been taken on the petition within twenty (20) days, the petition shall be deemed to have been denied.

(d) An order granting the petition and setting the matter for further proceedings shall state the extent and scope of the proceedings, which shall be limited to argument upon the existing record, and no new evidence shall be introduced unless the party proposing such evidence shows good cause for his failure to introduce the evidence in the original proceeding.

(e) The sixty-day period for a party to file a petition for review of a final order shall be tolled by granting the petition and setting the matter for further proceedings, and a new sixty-day period shall start to run upon disposition of the petition for reconsideration by issuance of a final order by the agency. [Acts 1982, ch. 874, § 58.]

**4-5-318. Effectiveness of new order.**—(a) Unless a later date is stated in an initial or final order, or a stay is granted, an initial or final order shall become effective upon entry of the initial or final order.

All initial and final orders shall state when the order is entered and effective.

(b) If the agency has utilized an administrative judge from the administrative procedures division of the office of the secretary of state, the initial or final order shall not be deemed entered until the initial or final order has been filed with the administrative procedures division.

(c) The agency shall establish which agency members, officials or employees may sign final orders rendered by the agency.

(d) A party may not be required to comply with a final order unless the final order has been mailed to the last known address of the party or unless the party has actual knowledge of the final order.

(e) A nonparty may not be required to comply with a final order unless the agency has made the final order available for public inspection and copying or unless the nonparty has actual knowledge of the final order.

(f) Unless a later date is stated in an initial order or a stay is granted, the time when an initial order becomes a final order in accordance with § 4-5-314 shall be as follows:

(1) When the initial order is entered, if administrative review is unavailable;

(2) When the agency enters an order stating, after a petition for appeal has been filed, that review will not be exercised, if discretion is available to make a determination to this effect; or

(3) Ten (10) days after entry of the initial order, if no party has filed a petition for appeal and the agency has not given written notice of its intention to exercise review.

(g) An initial order that becomes a final order in accordance with subsection (f) and § 4-5-314, shall be effective upon becoming a final order; provided, however:

(1) A party may not be required to comply with the final order unless the party has been served with or has actual knowledge of the initial order or of an order stating that review will not be exercised; and

(2) A nonparty may not be required to comply with the final order unless the agency has made the initial order available for public inspection and copying or the nonparty has actual knowledge of the initial order or of an order stating that review will not be exercised.

(h) This section shall not preclude an agency from taking immediate action to protect the public interest in accordance with § 4-5-320. [Acts 1982, ch. 874, § 59.]

**4-5-319. Record.**—(a) An agency shall maintain an official record of each contested case under this chapter. The record shall be maintained for a period of time not less than three (3) years, provided, however that the Department of Employment Security and Board of Review under § 50-7-601 shall be required to maintain the record for such period of time as shall be determined by the agency or otherwise required by law.

- (b) The agency record shall consist solely of:
- (1) Notice of all proceedings;
  - (2) Any pre-hearing order;
  - (3) Any motions, pleadings, briefs, petitions, requests, and intermediate rulings;
  - (4) Evidence received or considered;
  - (5) A statement of matters officially noticed;
  - (6) Proffers of proof and objections and rulings thereon;
  - (7) Proposed findings, requested orders, and exceptions;
  - (8) The tape recording, stenographic notes or symbols, or transcript of the hearing;
  - (9) Any final order, initial order, or order on reconsideration;
  - (10) Staff memoranda or data submitted to the agency unless prepared and submitted by personal assistants and not inconsistent with § 4-5-304(b);
  - (11) Matters placed on the record after an ex parte communication.

(c) A record (which may consist of a tape or similar electronic recording) shall be made of all oral proceedings. Such record or any part thereof shall be transcribed on request of any party at his expense or may be transcribed by the agency at its expense. If the agency elects to transcribe the proceedings, any party shall be provided copies of the transcript upon payment to the agency of a reasonable compensatory fee.

(d) Except to the extent that this chapter or another statute provides otherwise, the agency record shall constitute the exclusive basis for agency action in adjudicative proceedings under this chapter, and for judicial review thereof. [Acts 1974, ch. 725, § 8; 1975, ch. 370, §§ 3, 12; 1978, ch. 938, §§ 4, 5; T.C.A., §§ 4-514, 4-5-108(g); Acts 1982, ch. 874, § 60.]

**4-5-320. Proceedings affecting licenses.—**(a) When the grant, denial, or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this chapter concerning contested cases apply.

(b) When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(c) No revocation, suspension, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety, or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These pro-

ceedings shall be promptly instituted and determined. [Acts 1974, ch. 725, § 16; T.C.A., §§ 4-522, 4-5-116; Acts 1982, ch. 874, § 61.]

**4-5-321. Administrative procedures division—Duties.**—There is created in the office of the secretary of state a division to be known as the administrative procedures division. This division shall have the following responsibilities:

(1) Investigate any conflicts or inequities which may develop between federal administrative procedures, and state administrative procedures and propose any amendments to this chapter to correct those inconsistencies and inequities as they develop;

(2) Establish and maintain in cooperation with the office of the attorney general a pool of administrative judges and hearing officers, who shall be learned in the law;

(3) Establish and maintain in cooperation with the office of the attorney general a pool of court reporters for agency administrative hearing proceedings before the licensing boards which are under the supervision of the department of commerce and insurance and the department of health and environment;

(4) Perform any and all other functions assigned to the secretary of state under this chapter and delegated by him to the administrative procedures division. [Acts 1974, ch. 725, § 21; 1975, ch. 370, § 17; 1978, ch. 938, § 16; 1979, ch. 371, § 2; T.C.A., §§ 4-527, 4-5-121(a); Acts 1982, ch. 874, § 62; 1984, ch. 728, § 12.]

**4-5-322. Judicial review.**—(a)(1) A person who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter, which shall be the only available method of judicial review.

(2) A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) (1) Proceedings for review are instituted by filing a petition for review in a chancery court having jurisdiction within sixty (60) days after the entry of the agency's final order thereon.

(2) A person who is aggrieved by a final decision of the department of human services in a contested case may file a petition for review in the chancery court located either in the county of the official residence of the commissioner or in the county in which any one or more of the petitioners reside.

(3) The time for filing a petition for review in a court as provided in this chapter shall not be extended because of the period of time allotted for filing with the agency a petition for reconsideration.

(4) Copies of the petition shall be served upon the agency and all parties of record.

(c) The filing of the petition for review does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the reviewing court, in a hearing which shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the chancellor, shall be given by the petitioner conditioned to indemnify the other per-

sons who might be so injured and if no bond amount is sufficient, the stay shall be denied.

(d) Within forty-five (45) days after service of the petition, or within further time allowed by the court, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all the parties of the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings or decisions with the reviewing court.

(f) The procedure ordinarily followed in chancery courts will be followed in the review of contested cases decided by the agency, except as otherwise provided in this chapter.

(g) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before

the agency, not shown in the record, proof thereon may be taken in the court.

(h) The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record. In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

(i) No agency decision pursuant to a hearing in a contested case shall be reversed, remanded, or modified by the reviewing court unless for errors which affect the merits of the decision complained of.

(j) The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record. [Acts 1974, ch. 725, § 17; 1975, ch.

370, § 6; 1978, ch. 815, § 1; 1978, ch. 938, § 13; T.C.A., § 4-523; Acts 1980, ch. 478, § 1; T.C.A., § 4-5-117; Acts 1982, ch. 874, § 63.]

**4-5-323. Appeals to Court of Appeals.**—(a) An aggrieved party may obtain a review of any final judgment of the chancery court under this chapter by appeal to the Court of Appeals of Tennessee.

(b) The record certified to the chancery court and the record in the chancery court shall constitute the record in an appeal. Evidence taken in court pursuant to § 4-5-322(g) shall become a part of the record.

(c) The procedure on appeal shall be governed by the Tennessee Rules of Appellate Procedure. [Acts 1974, ch. 725, § 18; 1977, ch. 298, § 1; T.C.A., § 4-524; Acts 1981, ch. 449, § 2; T.C.A., § 4-5-118; Acts 1982, ch. 874, § 64.]